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Supreme Court, U.S.
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No. 190

In the Supreme Court of the United States

October Term, 1949.

GLEN S. DELL, Petitioner,

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

Petition for Writ of Certiorari, and Brief in Support Thereof.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1949.

No. .....

GLEN S. DILLE, *Petitioner,*

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

May It Please the Court:

Your petitioner, Glen S. Dille, respectfully petitions this Honorable Court for a writ of certiorari requiring the United States Court of Appeals for the Tenth Circuit to certify to this Court for its review and determination, the case of W. A. Delaney, Jr., and Zephyr Drilling Company, a corporation, Appellants, vs. The Carter Oil Company, a Corporation, and Glen S. Dille, Appellees, No. 3798, on the docket of said United States Court of Appeals for the Tenth Circuit.

I.

Statement of Matter Involved.

The plaintiff, The Carter Oil Company, a West Virginia corporation, brought this action in the United States District Court for the Northern District of Oklahoma, pursuant to Title 28 U. S. C., Sec. 400 (Revised Act, Title 28, U. S. C., Sections 2201, 2202), against the defendants Glen S. Dille, W. A. Delaney, Jr., and Zephyr Drilling Company, an Oklahoma corporation, all of whom were citizens of Oklahoma. Carter sought a declaratory judgment defining the rights of the parties in certain oil and gas leasehold estates in Garvin County, Oklahoma, and in a certain development and operation agreement it had entered into with Delaney and Zephyr.

Carter's petition (R. 3-8) with exhibits attached (R. 8-29) alleged no cause of action or claim against or controversy with any of the defendants. Carter alleged that without notice of interest in Dille, it had theretofore acquired by assignment from Delaney and Zephyr, the record owners, an undivided 60% interest in certain oil and gas leasehold estates in Garvin County, Oklahoma, and entered into an agreement with them to develop and operate said leasehold estates. Carter alleged that Dille was claiming as against his co-defendants Delaney and Zephyr an undivided 1/3 interest in said leasehold estates and was asserting the right to have the leases partitioned in kind, as appeared by a petition filed by Dille in a case pending in the District Court of Garvin County, Oklahoma, attached as Exhibit B to Carter's petition; that if Dille owned any interest in the leases, Delaney and Zephyr had a right to, and did bind his interest by the development and operating agreement (plaintiff's Exhibit A), which agreement impliedly prohibited any division or partition in kind of the lease-

hold estates. That the dispute among the defendants materially affected the liability of Carter as a purchaser of oil from said property, and Carter's rights and liabilities as operator of said property, "but except for those matters plaintiff stands disinterested and impartial as between the defendants." (R. 9)

Dille's petition in his suit against Delaney and Zephyr in the District Court of Garvin County, Oklahoma, (R. 64-72) asserted no claim against or controversy with Carter, but sought only to have Delaney and Zephyr decreed to be constructive trustees for the use and benefit of Dille of an undivided 1/3 interest in the undivided 40% interest of the leasehold estates remaining vested in Delaney and Zephyr, and for an accounting and that he have judgment against Zephyr and Delaney for one-third of the proceeds derived from sales of oil and gas leases and mineral rights within a certain described area. This was a recognition of Carter's rights as well as rights of any purchaser by any other sales theretofore made.

Dille's motion to dismiss (R. 36-37) was upon ground that Carter's purported action was fictitious because no justiciable controversy existed between Carter and Dille, and that the court was without jurisdiction because no diversity of citizenship existed since the only controversy suggested by Carter's petition was between Dille and his co-defendants Delaney and Zephyr, all of whom were citizens and residents of Oklahoma.

The answer and cross-claim of Delaney (R. 31-34) and the amended answer, counterclaim and cross-claim of Zephyr (R. 38-40), both adopt the entire theory of Carter's case. They allege no facts disclosing any antagonism, clash of interest or controversy with Carter.

Upon hearing of Dille's motion to dismiss (R. 128-143) the trial court after examining Dille's petition in the District Court of Garvin County, Oklahoma, announced (R. 130) that it appeared to the court Dille had not asserted any claim against Carter. The court then interrogated Dille and his attorney of record to ascertain what they claimed or whether they were asserting any claim against Carter, at the conclusion of which the court (R. 137-138) announced that it was obvious on the face of Carter's complaint that the principal controversy was between Dille on the one hand and Zephyr and Delaney on the other, and they all being residents of Oklahoma, as to their controversy, no diversity of citizenship existed and that the Federal Court had no jurisdiction; that Dille did not assert a claim against Carter in his complaint in Garvin County, Oklahoma; that Dille had never made any claim against Carter, and that there being no actual controversy between Dille and Carter, the court was without jurisdiction. At R. 142-143 the court sustained Dille's motion to dismiss upon the ground that there was no justiciable controversy between Carter and Dille and ordered the case dismissed.

The order dismissing case (R. 143-145) dismissed Carter's petition, the answers, amended answers, counterclaims and cross-claims of Delaney and Zephyr, motion for summary judgment of Delaney, and the entire case, without prejudice.

From this order of dismissal, Delaney and Zephyr appealed to the United States Court of Appeals (R. 145-146). *Carter did not appeal.*

Thereafter on April 15, 1949 (R. 147-153), the United States Court of Appeals reversed the case.

II.

This Court Has Jurisdiction.

(1) This petition for writ of certiorari is prosecuted pursuant to the provisions of Title 28, U. S. C., Sec. 1254.

(2) The opinion (R. 147), BRATTON, J., dissenting, and judgment (R. 153) of the United States Court of Appeals sought to be reviewed were filed April 15, 1949. Order was entered (R. 154) extending time to file petition for rehearing for ten days, on May 2, 1949. Petition for rehearing was filed (R. 181) May 12, 1949, and on May 18, 1949 (R. 183), the court entered an order denying said petition for rehearing.

III.

Questions Presented.

The question presented is whether under the constitution and laws of the United States the jurisdictional requirement of diversity of citizenship may be circumvented and evaded and jurisdiction acquired by a United States District Court to hear and determine a case or controversy between citizens of the same state upon a cross-claim filed by two defendants against a co-defendant in an action for declaratory judgment brought against them by a non-citizen plaintiff, whose complaint does not state or allege a cause of action or claim against, or controversy with, any of the defendants, and where upon inquiry by the trial court it is established without dispute or contradiction that the defendant, against whom his two co-defendants have filed cross-claim, did not have and at no time ever had or asserted a claim against or controversy with plaintiff.

IV.

Reasons Relied Upon for Allowance of the Writ.

The writ of certiorari should be allowed, because the decision of said court of appeals held and decided that:

> "It is true that judged by conventional concepts of rights of action, Carter stated no claim against Dille, or for that matter against any of the defendants. It asserted no breach of legal duty, nor asked for coercive relief. It claimed no proprietary interest in the undivided 40% interest in the leases; its asserted interest therein was to the effect that it had a duty under its contract to develop and operate the properties as a partnership enterprise, and that it could not discharge that duty orderly and efficiently unless the identity and respective rights of its partners were judicially determined. It alleged in effect that the uncertainty of the ownership of the undivided 40% interest in the leases created by Dille's suit rendered uncertain its contractual rights and liabilities, so that it could not proceed thereunder without the risk of peril to itself. It thus asserted a direct and immediate legal interest in the outcome of the controversy between the co-defendants. It sought to secure a settlement or stabilization of the rights of the parties by suing all interested parties for a declaration of their rights under a contract, in which they all claimed a legal interest. ***"
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> • • • • • • • •
>
> "We hold that Carter's complaint stated a claim for declaratory relief over which the trial court acquired jurisdiction and that it, therefore, erred in dismissing the action." (R. 151-152)

Said decision is in conflict with Art. 3, Sec. 2, Cl. 1, of the Constitution and is in conflict with decisions of this Court, on the same matter, in the following cases: *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 62 S. Ct. 15, 86 L. ed. 47;

Dawson v. *Columbia Ave. Savings Fund, etc., Co.*, 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713; *Blacklock, et al.*, v. *Small, et al.*, 127 U. S. 96, 32 L. ed. 70; and *Ashwander* v. *T.V.A.*, 297 U. S. 288, 80 L. ed. 688.

This Court has uniformly held that to sustain federal jurisdiction on the ground of diversity of citizenship, there must exist an actual and substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side; that it is the duty of the court to look beyond the pleadings and arrange the parties according to their sides in the dispute. Whether the necessary collision of interest exists, is determined not by mechanical rules, but is determined and ascertained from the principal purpose of the suit, from the primary and controlling matter in dispute.

The United States District Court has no jurisdiction of a case where the only substantial claim or controversy is prosecuted by and on behalf of one defendant, who at the time the action was brought was and still is a citizen of the same state as is the defendant against whom the only substantial relief in the case is claimed; nor can there be a justiciable controversy by allegations based merely on assumed potential invasion of plaintiff's rights.

In this case Carter's interest was that of Zephyr and Delaney. Zephyr and Delaney's controversy with Dille was the only controversy in the case. Since they were all citizens and residents of Oklahoma, realignment of the parties according to their sides in the dispute destroyed the jurisdiction of the court.

Wherefore, petitioner prays that this Court issue a writ of certiorari to the United States Court of Appeals for the

Tenth Circuit, commanding said court to certify to this Court a full and complete transcript of the record and of the proceedings in said Court of Appeals had in the case numbered and entitled on its docket, No. 3798, *W. A. Delaney, Jr., and Zephyr Drilling Company, Appellants, vs. The Carter Oil Company, a Corporation, and Glen S. Dille, Appellees,* to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment of said Court of Appeals of the Tenth Circuit may be reversed by this Court, and for such other relief as to this Court may seem proper.

Respectfully submitted,

ROBERT DADE HUDSON,
Tulsa, Oklahoma,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinions of Courts Below.

No written opinion was rendered by the trial court. Journal entry of the order of the trial court sustaining petitioner's motion to dismiss, appears at page 143 of record. Opinion of the Court of Appeals appears in record beginning at page 157, and is reported in 174 F. (2d) 314 (Adv.).

II.

Jurisdiction of This Court.

In Paragraph II of Petition for Writ of Certiorari, the grounds of jurisdiction of this Court are stated.

III.

Statemet of the Case.

A sufficient statement of the case has been made in Paragraph I of Petition for Certiorari, which in the interest of brevity is not repeated here.

IV.

Specifications of Error.

The errors of the United States Court of Appeals for the Tenth Circuit relied upon for reversal of its judgment in this case are stated in Paragraph IV of Petition for Certiorari, and are adopted by reference as a part of this brief.

V.

Argument.

In this case diversity of citizenship was the sole ground of federal jurisdiction. While there was diversity of citizenship between Carter, a West Virginia citizen, and Dille, Zephyr and Delaney, Oklahoma citizens, Carter stated no claim against or controversy with any of the defendants. Carter's complaint as it appears to counsel, discloses that Zephyr and Delaney were not real defendants but were on Carter's side of the case, or rather that Carter was on their side of a dispute with Dille, since Carter had no claim against or controversy with Dille. The whole object of Carter's complaint appears to be to enable Delaney and Zephyr, citizens of Oklahoma, to file a cross-bill against Dille, also a citizen of Oklahoma, and thus remove to the federal court for adjudication, a controversy pending in litigation between the defendants in the District Court of Garvin County, Oklahoma, which case Delaney and Zephyr could not have removed to the federal court, nor could that case have been originally filed in the federal court, since all of the parties were citizens of Oklahoma. *Industrial & Mining Guaranty Co.* v. *Electrical Supply Co., et al.*, (6th Cir.) 58 Fed. 732, 745; *Blacklock, et al.*, v. *Small, et al.*, 127 U. S. 96, 32 L. ed. 70; *Ikeler* v. *Detroit Trust Co.*, (D. C., E. D. Mich.) 30 F. Supp. 643, 646, 647, aff'd in *Farr* v. *Detroit Trust Co.*, (1st Cir.) 116 F. (2d) 807.

In *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 36 L. ed. 48, where diversity was also the sole ground of federal jurisdiction, it was said:

> "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants. It is our duty, as it is that of the lower federal courts to 'look beyond the

pleadings and arrange the parties according to their sides in the dispute.' *Dawson* v. *Columbia Ave. Sav. Fund, S. D. Title & T. Co.*, 197 U. S. 178, 180, 49 L. ed. 713, 715, 25 S. Ct. 420. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' *Dawson* v. *Columbia Ave. Sav. Fund, S. D. Title & T. Co., supra,* at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' *East Tennessee V. & G. R. Co.* v. *Grayson*, 119 U. S. 240, 244, 30 L. ed. 382, 383, 7 S. Ct. 190, and the 'primary and controlling matter in dispute,' *Merchants Cotton Press & Storage Co.* v. *Insurance Co. of N. A.*, 151 U. S. 368, 385, 38 L. ed. 195, 204, 14 S. Ct. 367, 4 Inter. Com. Rep. 499. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this court."

The Court in that case observed that plainly Chase and Indianapolis Gas Co. were partners in litigation. To paraphrase: Plainly, Carter and Delaney and Zephyr were partners in litigation. What Carter wanted, Delaney and Zephyr also wanted, and in fact Carter, Delaney and Zephyr were on the same side of the case against Dille and were litigating the only controversy in the case which was between Zephyr and Delaney on one side and Dille on the other.

Petitioner respectfully submits that the Writ of Certiorari applied for should be granted by this Court and that upon a review of the decision and judgment of the Court of Appeals in this case, that the same be reversed.

Respectfully submitted,

ROBERT DADE HUDSON,
Tulsa, Oklahoma,
Attorney for Petitioner.

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No. 190

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GLEN S. DILLE, *Petitioner*,

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

RESPONSE AND BRIEF OF W. A. DELANEY, JR., AND ZEPHYR DRILLING COMPANY, RESPONDENTS.

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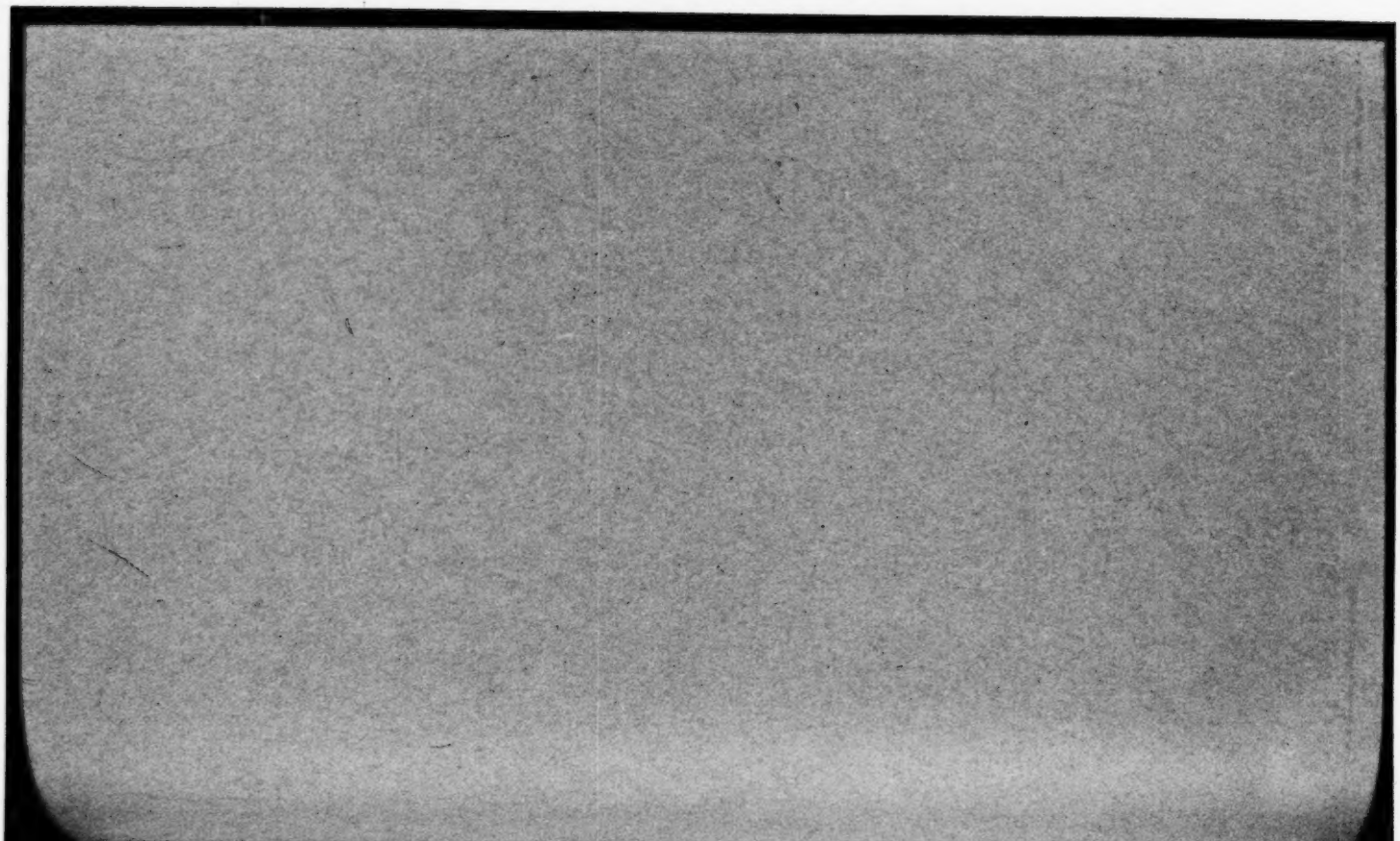

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IN THE SUPREME COURT OF THE UNITED STATES.
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No. 190

GLEN S. DILLE, *Petitioner,*

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

RESPONSE AND BRIEF OF W. A. DELANEY, JR., AND ZEPHYR DRILLING COMPANY, RESPONDENTS.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

May It Please the Court:

The respondents, W. A. Delaney, Jr., and Zephyr Drilling Company, a corporation, herewith present their response to the petition for writ of certiorari of Glen S. Dille filed in the above styled and numbered cause.

I.

Statement of Matter Involved.

The statement of the petitioner is incomplete and this statement of the case is offered to supply omissions. The

decision of the court below turned upon the allegations of the complaint and a full statement of them is necessary.

Carter's complaint (R. 3 to 8) alleges: On March 5, 1946, it entered into a contract with these respondents to acquire a 60% ownership of certain oil and gas leases for a consideration of $25,000.00 and the drilling of an exploratory well subject to examination and approval of titles. From an examination of abstracts and muniments of title Carter ascertained that the record title to the leases was in these respondents and the contract of purchase was consummated. The contract appears as Exhibit A, pages 8 to 15 of the record. It contains not only the agreement to purchase but also provisions for the development and operation of the leases by Carter. It provides for distribution of costs and expenses, conditions under which Carter is authorized to incur expenses, and when and under what circumstances the assent of Delaney and Zephyr must be obtained for proposed expenditures (R. 10 to 12). It provides that Delaney and Zephyr shall have certain specific rights of inspection, examination and audit (R. 12 and 13). Carter is given the right to purchase all production subject to the right of Delaney and Zephyr upon notice to receive their proportionate parts in kind or separately to dispose of the same (R. 13). The operation of the leaseholds is placed in Carter with full powers of control and management except the consent of Delaney and Zephyr must be obtained for the drilling of any wells other than necessary off-sets. (R. 11) The agreement clearly contemplates the development and operation of all of the leaseholds as a whole in one joint adventure. The basis of the agreement was the representation by Delaney and Zephyr that they owned the leases involved (R. 8 to 9 and 17). Exhibit B to the complaint (R. 19 to 29) is a detailed agreement as to accounting

procedure to be followed by the parties ancillary to the performance of the principal contract.

It is alleged that Dille has filed an action in the District Court of Garvin County, Oklahoma, against Delaney and Zephyr to establish a joint adventure or partnership between them under which Dille would be the owner of an undivided one-third interest in the leases and for the partition of leases in kind accordingly.

The complaint alleges Carter entered into the performance of the agreement; that it expended $98,171.00 in drilling the first well; that up to the time of filing its action it had drilled nineteen wells at the cost of approximately $1,000,000.00 for drilling and equipment (R. 4 and 5), all of which was without any notice of claim by Dille. It alleges that the leases have not been fully developed and may require further exploration; that as of the date of the commencement of its action the leases were producing oil at the rate of $156,677.50 per month; that the interest claimed by Dille amounts to more than $30,000.00 per month and in the disbursement of that sum Carter is subject to a hazard and risk to which it should not be liable. (R. 6)

The complaint further alleges that the agreement impliedly prohibits partition of the leaseholds in kind and that Carter cannot proceed with the performance of its obligations under the agreement without a determination of the rights of the defendants therein; that it must know what persons have the right to approve the drilling of new wells, and to approve expenditures in excess of $3,000.00; to what persons and in what proportions the costs of operation should be charged and to whom and in what proportions the income should be distributed. (R. 6 and 7)

The complaint further alleges that, if Dille has any

interest in the leaseholds, Delaney and Zephyr had the right to and did bind him and his interest by their execution of the contract (R. 6 and 7).

The relief sought is: (*1*) That the contract be declared binding upon Dille, Delaney and Zephyr; (*2*) that none of them may have partition; (*3*) that the proportionate share owned by each of the defendants be determined; and (4) that the contract be construed to vest in Delaney and Zephyr alone the right to give consents to drilling additional wells and making expenditures. (R. 7 and 8)

The action was filed May 28, 1948. On June 30, 1948, Delaney filed his answer and cross-claim (R. 31 to 34). Delaney admits the execution of the contract but denies that he executed it for and on behalf of Dille. He states he does not have sufficient information as to the costs and expenses set up by Carter. For cross claim against Dille, Delaney asserts that Dille has no interest whatever in the leaseholds; that no partnership or joint agreement existed between them, that he had no notice of any right or claim of Dille at the time of his acquisition of the leases. Delaney asks judgment declaring (*1*) that no partnership or joint adventure exists between him and Dille; (*2*) that Delaney acquired his interests without notice of any claim by Dille; (*3*) that Dille is estopped to assert any such claim as against Delaney; and (*4*) that Carter pay to Delaney his proportionate part of any sums due under the contract without diminution by reason of Dille's claim.

On July 13, 1948, Zephyr filed its amended answer, counterclaim against Carter and cross-claim against Dille. (R. 38 to 41) Its answer is substantially the same as Delaney's. Its counterclaim against Carter seeks judgment directing Carter to recognize Zephyr's interest under the contract and to pay Zephyr 20% of the income from the

properties. Its cross-claim against Dille denies the existence of a partnership or joint adventure, denies that Dille has any interest in the leases whatsoever and seeks judgment accordingly.

On July 6, 1948, Dille filed his motion to dismiss (R. 36 and 37) on the ground that no controversy existed between the plaintiff and any of the defendants, that the only controversy existed between Dille and his co-defendants, Delaney and Zephyr, and that, since all the defendants were residents of Oklahoma, there was no justiciable controversy between citizens of different states. The motion also stated that the defendant Dille had offered and was then prepared to give a written statement to the Carter that no claim adverse to the Carter was asserted by the defendant Dille. It is important to note here that although such offer was made, and a stipulation prepared by Carter and presented to the defendant Dille, the latter refused to execute it. (R. 41, 59-60, 135-136)

A hearing was held on the motion to dismiss on July 16, 1948 (R. 41 to 60). Briefs were filed and on September 16, 1948, the motion came on for final disposition (R. 128 to 143). Upon admissions, waivers and agreements made at that time by Dille and his counsel, the trial court found no justiciable controversy existed between Carter and Dille and dismissed the action together with the counter-claim and cross-claims of Zephyr and Delaney. (R. 143 to 145)

On appeal the Court of Appeals for the Tenth Circuit held: (*1*) that the jurisdiction of the trial court must be governed by the allegations of the complaint whether those allegations are well founded or not; (*2*) that the complaint stated a claim for declaratory relief; (*3*) that jurisdiction cannot be denied upon ascertainment of facts which go to the merits of the action; and (*4*) that Delaney and Zephyr

had a direct, immediate, substantial interest in the subject-matter of the action and the right to appeal from the order of dismissal.

II.

Jurisdiction.

This Court has jurisdiction to review the decision of the Court of Appeals by certiorari. However, the decision is not one coming within any of the grounds enumerated in Rule 38, subsection 4(b). The questions presented do not appear to have either the gravity or importance usually required for granting a writ of certiorari nor is uniformity of decision involved.

III.

Questions Presented.

We cannot agree that the question presented by the record is that stated in the petition. It is clear from the record and the decision of both the trial court and the Court of Appeals that the questions considered and decided were: *First,* did the complaint state a cause of action; *second,* did the admissions, waivers and agreements made by Dille and his counsel establish the legal insufficiency of the complaint and the non-existence of a justiciable controversy; and, *third,* did the respondents Delaney and Zephyr have a right of appeal from the order of dismissal. The matter should be considered here on the points which determined the decisions below.

IV.

The Writ Should Be Denied.

In so far as the petition may present the constitutional question that under Article 3, Section 2, Clause 1, the courts of the United States may not entertain an action for de-

claratory relief, the matter has been settled. *Aetna Life Insurance Company* v. *Haworth,* (1937) 300 U. S. 227, 57 S. Ct. 461, 81 L. ed. 617.

The petitioner is not entitled to the writ as a matter of right but it lies in this Court's discretion.

Ordinarily, writs of certiorari will be allowed only to resolve a conflict of decisions between the several Courts of Appeal or where the question is of such importance that it is in the public interest to have it decided by the court of last resort. *Magnum Import Company* v. *Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. ed. 922 (1923); *Lau Ow Bew* v. *United States,* 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340 (1892).

To the extent that the decisions of the courts below were reached upon questions of fact, certiorari will not ordinarily be granted for a review here. *National Labor Relations Board* v. *Waterman S. S. Corporation,* 309 U. S. 206, 60 S. Ct. 493, 84 L. ed. 704 (1940); *General Talking Pictures Corporation* v. *Western Electric Company,* 304 U. S. 175, 546, 58 S. Ct. 849, 82 L. ed. 1273 (1938); *Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S. 508, 44 S. Ct. 164, 68 L. ed. 413 (1924).

The action of the Court of Appeals for which review is here sought is not a final decision. Except in extraordinary cases, the writ will not issue until after final judgment. This is not shown to be an extraordinary case. *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Company,* 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. ed. 629, 633 (1916); *American Construction Company* v. *Jacksonville T. & K. W. R. Co.,* 148 U. S. 372, 378, 384, 13 S. Ct. 758, 37 L. ed. 486, 489, 491 (1893); *The Three Friends,* 166 U. S. 1, 49, 17 S. Ct. 495, 41 L. ed. 897, 913 (1897); *The Conquerer,* 166 U. S. 110, 113, 17 S. Ct. 510, 41 L. ed. 937, 939 (1897); *Denver* v. *New York Trust Company,* 229 U. S. 123, 133, 33 S. Ct. 657, 57 L. ed.

1101, 1120 (1913); *John Simmons Company* v. *Grier Brothers Company*, 258 U. S. 82, 91, 42 S. Ct. 196, 66 L. ed. 475, 480 (1922).

Conflict of decisions among the Courts of Appeal has not been shown and petitioner does not point out either the importance of the question or any public interest therein.

Nor is the decision in conflict with the decisions of this Court. In *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 62 S. Ct. 15, 86 L. ed. 47, (1941) the subject-matter of the action was a lease contract to which the plaintiff was not a party. The plaintiff sought by its action to have that contract declared binding on the City of Indianapolis as the successor in title of the original lessee. The Chase Bank's only interest in the property leased was that of trustee under a mortgage deed executed prior to the lease. The Chase Bank and the lessor both asserted the lease was binding on the City. This assertion the City denied. This Court held the parties must be re-aligned and the resulting loss of diversity required dismissal.

In the case at bar, Carter contends that a contract to which it is a party is binding on Dille. Delaney and Zephyr both deny that Dille has any interest in the contract or its performance. It is the interest of Carter to sustain its agreement as against Dille's claims; it is the interest of Delaney and Zephyr wholly to defeat his claims. Carter has no interest in the defeat of Dille's claims and so avers. There is no community of interest between Carter on the one hand and Delaney-Zephyr on the other requiring a realignment.

In *Dawson* v. *Columbia Avenue Savings Fund Company*, 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713 (1905), the plaintiff, a mortgagee, sought enforcement by specific

performance of a contract between the City of Dawson and the Dawson Waterworks Company to which contract the plaintiff was not a party. Whatever interest the mortgagee may have had in the performance of the contract, it was identical with that of the Waterworks Company. The case is not in point.

In *Blacklock* v. *Small,* 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70, (1888), the holder of a mortgage bond assigned to plaintiff. The assignor and defendants were citizens of the same state. It was held that jurisdiction was denied by 18 Stat. 470, Act of March 3, 1875, ch. 137, Section 1. The case is not in point.

Ashwander v. *Tennessee Valley Authority,* 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. ed. 688, 699 (1926), defines "cases of actual controversy" under the Declaratory Judgments Act as "a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding a hypothetical state of facts." The decision sustains the conclusion reached by the Court of Appeals that the complaint here stated a cause of action for declaratory relief.

In that conclusion the Court of Appeals is sustained by the following decisions: *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227, 240, 57 S. Ct. 461, 464, 81 L. ed. 617, 621 (1937); *Maryland Casualty Company* v. *Pacific Coal & Oil Company,* 312 U. S. 270, 273, 61 S. Ct. 510, 512, 85 L. ed. 826, 828 (1941); *Atvater* v. *Freeman,* 319 U. S. 359, 364, 63 S. Ct. 1115, 1118, 87 L. ed. 1450, 1454 (1943); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 92, 119, 67 S. Ct. 556, 91 L. ed. 754, 769, 783; *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, 125, 68 S. Ct. 1349, 1358, 92 L. ed. 1849, 1862 (1948); *Nashville C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 260, 53 S. Ct. 345, 347, 77 L. ed. 730, 734 (1933).

V.

ARGUMENT.

The action is one in the nature of a suit to quiet title. Carter's rights and obligations under its contract with Delaney-Zephyr were clouded and rendered uncertain by the assertions of Dille. It could proceed with the performance of that contract at its own peril or upon its own interpretation of its rights or abandon it with the certainty of incurring an action by Delaney-Zephyr for damages for the breach. This situation created the cause of action which Carter here asserts. It was the direct and immediate result of the claims of Dille. Carter's controversy with Dille is whether its rights under its contract are superior to the claims of Dille. The several points of that controversy are succinctly set out in the stipulation submitted by Carter which Dille refused to execute (R. 62 to 64). In order to evade a trial on the merits of his claims, Dille subsequently, in open court, agreed to terms of the stipulations with certain modifications (R. 143-145). It plainly appears that Dille's acts gave rise to the filing of this action; that his conduct thereafter demonstrates a substantial controversy between him and Carter; and, that his admissions and waivers subsequently given were prompted solely by his purpose to evade a trial on the merits in the court below.

The action to which the petition refers as then pending in the State District Court of Garvin County, Oklahoma, was dismissed there for lack of jurisdiction on October 1, 1948, on the motions of the defendants in that action. Delaney's motion appears in this record at pages 34 to 36.

It seems obvious that Carter's controversy with Dille could not be properly presented unless both Delaney and Zephyr were made parties to the action. Their interest in

the subject-matter, while in no manner identical with the interest of Carter, made them necessary parties to a full and complete determination of the controversy between Carter and Dille.

The controversy between Carter on the one hand and Delaney-Zephyr on the other arose from the demands by the latter that they alone be recognized by Carter as having authority to limit expenditures and approve the drilling of additional wells and for payment of their shares of the income without diminution by reason of Dille's claims (R. 56 and 57). Carter could not accede to those demands except at its peril. These circumstances are set up in the complaint and show the basis for and the existence of the controversy between Carter and Delaney-Zephyr. The answers of those parties admit the truth of the circumstances alleged and the existence of that controversy. Those admissions do not identify the interests of Delaney-Zephyr with the interest of Carter.

We believe the decision in *Maryland Casualty Company* v. *Pacific Coal & Oil Company, et al.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. ed. 826, (1941) is in point and controlling.

Dille's confessions did not settle the controversies existing between the parties, but merely relieved Carter temporarily from the peril of proceeding with the performance of the contract. The extent of Dille's rights against Carter, with respect to accountings, sales of products and distribution of income is not determined by Dille's admissions. He merely agreed to defer that determination until such time as he may be adjudged to be the owner of an interest in the leases and waived any claim occurring during the interim (R. 143 to 145). He sought by his confessions to evade a final determination of his claims of right both as

against Carter and as against these respondents in the courts below. Therefore, there was and still remains a justiciable controversy between Carter and all of the defendants.

Dille's motion to dismiss and his admissions, waivers and stipulations went to the merits of the action, not to the jurisdiction of the court. *The Fair* v. *Kohler Die & Specialty Company,* 288 U. S. 22, 25, 33 S. Ct. 410, 57 L. ed. 710, 717 (1913); *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305-308, 44 S. Ct. 96, 98-99, 68 L. ed. 308, 314, 315 (1923); *Bell* v. *Hood,* 327 U. S. 678, 682, 66 S. Ct. 773, 776, 90 L. ed. 939, 943 (1946).

Since the complaint stated a cause of action cognizable in the court below, it had jurisdiction to try and determine the issues between the co-defendants. *Rickey Land & Cattle Company* v. *Wood,* 218 U. S. 258, 263, 31 S. Ct. 11, 54 L. ed. 1032, 1038 (1910); *Mitchell* v. *Maurer,* 293 U. S. 237, 243, 55 S. Ct. 162, 164, 79 L. ed. 338, 342 (1934); *Mathis* v. *Ligon, et al.,* 37 F. (2d) 635, (C. C. A. 10, 1930) certiorari denied, 282 U. S. 846, 51 S. Ct. 26, 75 L. ed. 751.

And that jurisdiction is not lost by the subsequent admissions, confessions and stipulations of Dille. *Kirby* v. *American Soda Fountain Company,* 194 U. S. 141, 24 S. Ct. 619, 48 L. ed. 911 (1904); *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 607, 610, 46 S. Ct. 367, 70 L. ed. 750, 756 (1926).

The respondents, W. A. Delaney, Jr., and Zephyr Drilling Company, respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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No. 190

In the Supreme Court of the United States

October Term, 1949.

GLEN S. DILLE, *Petitioner,*

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

RESPONSE OF THE CARTER OIL COMPANY TO PETITION FOR WRIT OF *CERTIORARI.*

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Attorneys for the Carter Oil Company.

Of Counsel:
WALTER DAVISON.

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RESPONSE OF THE CARTER OIL COMPANY TO PETITION FOR WRIT OF *CERTIORARI.*

May It Please the Court:

Because the petition for the writ and the brief in support of it seem to infer that the case at bar was fictitious or collusively brought, this response is filed.

The Carter Oil Company filed this suit in good faith, in a court which its lawyers believed had jurisdiction, to protect its own rights. It did not appeal from the judgment of dismissal, even though it deemed the judgment erroneous, because of the conviction that it is protected by Dille's stipulations and admissions made in open court immediately prior to the dismissal (R. 133-136). After the suit was brought, and until the day it was dismissed, as to all matters included in the stipulation and admissions, Dille

had kept the word of promise to the ear (R. 36-37; 44) only to break it to the hope. Thus, respondent offered to dismiss the complaint if Dille would execute a stipulation tendered him (R. 41). His counsel studiously refrained from any definite commitment (R. 41, 44, 49-50, 59, 60), protested the stipulation was destructive of Dille's rights (R. 59, 60-61), but at the last hearing agreed to everything the stipulation contained (R. 132-136) and its substance was inserted in the order of dismissal (R. 143).

Here are the essential facts out of which the litigation arose:

In March, 1946, admittedly without any notice of Dille's claim, The Carter Oil Company bought from the defendants Delaney and Zephyr Drilling Company an undivided 60% interest in a block of unproven oil and gas leases (of which such defendants were the record owners) for $25,000 cash and an agreement to drill a test well, which was drilled at a cost of some $98,000.00 (R. 3, 4). Under its contract with these two defendants, Carter was the operator of the leases. Up to May, 1948, approximately $1,000,000.00 was spent in development, of which Carter had paid not less than 60%; but the leases were not fully developed and further expenditures were required (R. 6); Carter was purchasing from the leases oil of the value of approximately $156,000.00 per month, and was of course obligated to pay the true owners its value (R. 6); according to its contract, Carter was under the necessity of obtaining consents to various acts performed in development and operation (R. 7), was obliged to pay out the profits of the venture (R. 7); and was entitled to collect 40% of development and operating charges. (R. 7, 11)

In this state of affairs, Dille sued Delaney and Zephyr

Drilling Company in a state court to recover an interest—apparently an undivided one-third interest—in the leases and to partition them, but the complaint in that case is not designated as a part of the record (R. 29), although the amended complaint is here (R. 64). Carter was not a party to the state court litigation (R. 6).

Thereupon this suit was filed. The Carter Oil Company sought an adjudication and declaration of its own rights in these particulars (R. 7-8):

1. That its contract with Delaney and Zephyr be declared to be in full force and binding upon all the defendants.
2. That none of the defendants had the right to partition as against Carter.
3. An adjudication of the proportionate share owned by each defendant in the 40% interest in the leases.
4. The respective rights of each defendant in oil produced from the leases.
5. The respective liability of each defendant for further development and operation costs.
6. An adjudication that Delaney and Zephyr might give all consents required to be obtained by Carter under its contract.
7. General equitable relief.

As to each of these, Carter stood alone in its own interest, and could not be aligned with any defendant.

Surely no extended argument is required to demonstrate that Carter needed such adjudications for its own protection, especially when the size of the venture and the amount of expenditures are considered. Oil purchases alone were running at the rate of $156,000.00 per month, and if Dille was entitled to receive a part thereof—perhaps as much as one-

third—Carter was entitled to know it, rather than to proceed at its own risk in paying for the oil. It will not do to say that Carter misjudged Dille's claim. In the first place, the original petition is omitted from this record. In the second place, even the trial judge was not certain of the nature of the claim asserted by Dille (R. 129), and said (R. 130):

> "Now, I suggested in sending out notice that counsel for the various parties be present here today and also requested that Mr. Dille be present because I concluded that there was no reason for me to speculate with respect to the claim being asserted by Dille through his counsel in the District Court of Garvin County. I can see no reason why I cannot call on him to tell me just what is—what claim he makes there and whether or not he asserts that he is now entitled to be paid any part of the proceeds from this oil so that I may be reasonably certain as to whether there is an existing controversy between Dille and the Carter Oil Company."

Then followed the hearing above referred to, in which questions were propounded to and answered by counsel for Dille and by Dille himself (R. 130-136, 141), the result being that Dille agreed to the stipulation he had theretofore refrained from agreeing to (R. 135).

We submit, therefore, that The Carter Oil Company's complaint did present a justiciable controversy. It presented questions which the trial judge was unwilling to decide from a mere inspection of the papers. It presented questions upon which parol evidence was heard, for that is the result of the hearing held. In effect, the case was tried on the merits. See order dismissing case (R. 143-145).

Carter was not a party to the state court suit. As a practical matter, since the defendants were contesting that court's jurisdiction (R. 34, 39), it would have been unwise

for Carter to have intervened in that case. And legally, it had the right to resort to the Federal Courts.

"The right of a plaintiff to choose a Federal Court where there is a choice cannot be properly denied." A plaintiff may not "be forbidden to try the facts upon which his right to relief is based before a court of his choice, if otherwise competent." (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 383; *K. C. S. Ry. Co.* v. *Cornish*, (C. C. A. 10) 65 F. (2d) 671, *acc.*); "he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." (*Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819); "and it makes no difference what his motive may be in electing to invoke federal jurisdiction." (*Sias* v. *Johnson*, (C. C. A. 6) 86 F. (2d) 766.)

Each defendant was interested in establishing or maintaining his claimed interest in these properties. Concerning this dispute, as such, Carter was impartial, for it did not care whether one, or two, or all three defendants owned the 40% interest in the leases and the oil produced from them, nor did it care in what proportions such interest was owned. But since it was the operator of the properties and the purchaser of the oil produced from them, Carter needed, for its own protection, and adjudication of these matters and of its right under the contract. There was a justiciable controversy between Carter on the one side and the three defendants on the other, of which the trial court had jurisdiction.

—*Rex* v. *International Harvester Co.*, (C. C. A. 5) 107 F. (2d) 767;

Maryland Casualty Co. v. *Glassell-Taylor & Robinson*, (C. C. A. 5) 156 F. (2d) 519;

Hunter v. *Federal L. Ins. Co.*, (C. C. A. 8) 111 F. (2d) 551;

Mallers v. *Equitable Life Assur. Soc.*, (C. C. A. 7) 87 F. (2d) 233;

Henderson v. *Plymouth Oil Co.*, (C. C. A. 3) 19 F. (2d) 97;

McComb v. *McCormack*, (C. C. A. 5) 159 F. (2d) 225.

Jurisdiction is to be determined by reference to the allegations of the complaint (*Utah Fuel Co.* v. *National Bituminus Coal Commission*, 306 U. S. 56, 60, 83 L. ed. 483, 487; *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 90 L. ed. 358) and of course a court's jurisdiction is not destroyed by a defendant's confession of the allegations made against him (*Matter of Reisenberg*, 208 U. S. 90, 107-108, 52 L. ed. 403, 411), nor by his denial of such allegations (2 Moore's Fed. Practice, 2nd Ed., p. 397).

We trust that this is sufficient to establish that the complaint was not wholly without merit and that it was filed in good faith.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on the ..... day of ....., 1949, I served a copy of the within brief upon the following:

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they being attorneys of record for the petitioner and respondents herein, other than The Carter Oil Company.

This ..... day of ....., 1949.

.....